SUPREME COURT, U. S.

IN THE

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Supreme Court of the United States

October Term, 1967
No. 1327

SYDNEY N. FLOERSHEIM, ELAINE A. FLOERSHEIM, PAUL PINK, HERMAN WINTERS, and RALPH SCHNEIDER,

Petitioners,

vs.

HAROLD J. POWERS, DIRECTOR OF THE DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

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Respondent Harold J. Powers, Director of the Department of Professional and Vocational Standards of the State of California, hereinafter referred to as "Director", respectfully files this Opposition to Petition for Writ of Certiorari to review a judgment of the Court of Appeal of the State of California, Second Appellate District, Division 5.

OPINION BELOW

The opinion of the California Court of Appeal (Appendix A of Petition) is reported at 256 A.C.A. 242, 63 Cal. Rptr. 913.

JURISDICTION

Director agrees with petitioners' statements as to "Jurisdiction."

QUESTIONS PRESENTED FOR REVIEW

Director agrees with petitioners' statements as to "Questions Presented For Review."

CONSTITUTIONAL PROVISIONS INVOLVED

Director agrees with petitioners' statements as to "Constitutional Provisions Involved."

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTIONS INVOLVED

Petitioners (hereinafter referred to collectively as "Floersheim") have quoted relevant sections of the California Business and Professions Code. The Director asserts the following additional sections are relevant:

> Section 6870. "Necessity of license. No person shall engage within this State in the business of collecting claims for others or conduct within this State a collection agency as defined in Sections 6852 and 6853 of this chapter unless he shall hold a valid collection agency license pursuant to the provisions of this chapter."
>
> Section 6875. "Application for license; name. Application for a license shall be made in writing to and filed with, the chief in such form as may

be required by the chief. In addition to the information or documents required by this chapter, the chief may require the submission of any other information, evidence, statements, or documents.

"Every application for a license shall state, among other things that may be required, the name of the applicant with the name under which the applicant will do business, and the location by street and number, city and state of the office of the business for which the license is sought.

"No license shall be issued in any fictitious name which may be confused with or which is similar to any federal, state, county, or municipal governmental function or agency, or in any name which may tend to describe any business function or enterprise not actually engaged in by the applicant, or in any name which is the same as or so similar to that of any existing licensee as would tend to deceive the public, or in any name which would otherwise tend to be deceptive or misleading."

STATEMENT OF THE CASE

Director agrees with the statements made by Floersheim under the headings:

1. "The Cross-Appeals."
2. "The Parties."
3. "The Nature of the Action and the Relief Sought."
4. "The Original Judgment of the Trial Court."
5. "Judgment After Decision by the Court of Appeal."

SUMMARY OF MATERIAL FACTS

Director agrees with Floersheim's "Summary of Material Facts" (petn. p. 7) except as follows:

1. Floersheim states that, "It is not contended that defendants' forms or business methods now in issue violate" any enactments respecting unfair or deceptive business practices. (Petn. p. 7, para. 6.) This statement does not accurately reflect the Director's position. At the trial the Director urged that the question of whether Floersheim's operations fell within the terms of Business and Professions Code section 6853 did not depend upon a determination that the forms were misleading or deceptive. The Director noted, nevertheless, that petitioners' forms probably were misleading and fraudulent. (Vol. 1, Rep. Tr. p. 123, 125; Vol. 2, Rep. Tr. p. 462; Vol. 3, Rep. Tr. pp. 720-21.)

2. Floersheim states that State authorities have not moved against numerous stationers and others engaged in the "open and notorious sale of collection forms." Petn. p. 8.) This statement is not accurate. The trial court did not find that stationers and others were engaged in "open" or "notorious" sale of forms. (Cl. Tr. p. 101.)

While the trial court did find (Finding III.40, Cl. Tr. p. 101) that the Director and his predecessors had known for many years that many stationery stores and printers regularly sell forms designed, intended and calculated to assist purchasers thereof to collect debts, there is no evidence that the Director or his predecessors had actual knowledge of such practices.

Furthermore, the uncontradicted evidence shows that the Collection Agency Licensing Bureau since at least December 1960 has prosecuted persons for selling a sys-

tem of collection forms and has advised others to cease and desist from such unlicensed activity. (Vol. 2, Rep. Tr. p. 327, lines 7-25; Exh. 22; Exh. 24-C at Cl. Tr. p. 208; Vol. 2, Rep. Tr. p. 327, line 20 to p. 328, line 11; p. 332, line 22 to p. 333, line 15; Exh. 25-B at Cl. Tr. p. 206; Exh. 24-D at Cl. Tr. p. 210; Vol. 2, Rep. Tr. p. 356, lines 9-18.) Additionally, George Soloff, Chief of the Bureau, testified that he had observed the stationery store forms submitted by defendants for the first time during the trial and that appropriate action would be taken if warranted. (Vol. 2, Rep. Tr. p. 342, lines 18-25; p. 345, lines 1-9.) As a result of the foregoing, the trial court properly found that respondent had not enforced or attempted to enforce any laws against Floersheim in a discriminatory manner nor has Floersheim been denied equal protection of the laws. (Cl. Tr. p. 99.)

3. Floersheim omits to mention that in some instances debtors who received Floersheim's forms have sent payments to the latter instead of to the creditor. (Vol. 2, Rep. Tr. pp. 490-93.)

4. Floersheim states that respondent's predecessor in office approved certain forms sold by Floersheim without attempting to require the latter to obtain a collection agency license. (Petn. p. 11.) This statement is inaccurate. The evidence shows that Floersheim submitted certain skip tracing forms to the former Director who stated in a letter that those forms, if used by a licensed collection agency, would not violate Business and Professions Code section 6947(h). The Director noted, however, that he reserved the right to change this policy. (Exh. 8-C.) The former Director testified that when he wrote the letter, he did not intend

to pass upon the question of whether a license was required for the sale of such forms. (Vol. 2, Rep. Tr. p. 397, lines 19-22.)

5. Floersheim omits material facts which show that Floersheim is intimately involved in the business of debt collection. The uncontradicted facts show: (1) Floersheim distributed to customers brochures which stated that petitioners' forms "don't analyze—they just collect". (Cl. Tr. p. 40.) (2) Sydney Floersheim represented to a potential customer that the collection forms are effective because they lead the debtor to believe a third party has intervened and is seeking to collect the debt. (App. A, p. 15 Petn.) (3) Floersheim is not engaged in the printing business and does not print the forms which are sold, although Floersheim does number the forms and insert certain information thereon. (Vol. 2, Rep. Tr. pp. 451, 452.)

JURISDICTIONAL GROUNDS PREVIOUSLY RAISED

Director agrees with Floersheim's statements as to "Jurisdictional Grounds Previously Raised."

ARGUMENT

I.

SECTION 6853 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE IS A VALID REGULATION UNDER THE STATES' POLICE POWER.

1. The Business of Assisting Others to Collect Delinquent Debts or Claims Is Subject to Regulation by the State.

Watson v. State Commissioner of Banking, 223 A.2d 834, 836 (Me. 1966); appeal dismissed, 389 U.S. 9 (1967);

Koepple v. Morrison, 84 Cal. App. 137, 141, 257 P. 590, 591 (1927);

15 Am. Jur. 2d p. 555; 54 ALR 2d 883-85.

2. The California Statutes Do Not Prohibit Persons From Engaging in the Business of Assisting Others to Collect Delinquent Debts Provided They Qualify and Obtain a License to Engage in Such Activity.

California Business and Professions Code Sections 6870, 6875.

Floersheim has made no claim that the regulatory statutes impose upon applicants or licensees unreasonable licensing fees or unreasonable restrictions, nor is there any claim by Floersheim that they have sought a license or that they have been improperly denied a license.

The fact that a license, if granted, may subsequently be revoked does not necessarily invalidate the licensing regulation.

Jones v. Opelika, 316 U.S. 584, 599 (1947).

3. The Sale of the Forms by Floersheim Does Not Constitute an Exercise of Speech or Press Within the Meaning of the First Amendment of the United States Constitution.

The forms are mere instruments or devices to be used to collect delinquent debts in a purely commercial venture and are not vehicles for the transmission or interchange of ideas, viewpoints or opinions.

Weaver v. Jordan, 64 Cal. 2d 235, 246, 49 Cal. Rptr. 537, 545, 411 P.2d 289, 297, cert. den. 385 U.S. 844 (1966).

No opinion, thought, expression or other form of information is contained in the forms. (App. A, p. 12 Petn.)

4. Assuming Floersheim's Activities in Selling the Forms Constitute the Exercise of a Form of Speech or Press, Such Activity Is Subject to Regulation.

Jones v. Opelika, 316 U.S. 584, 597 (1947);
Acuff v. Mueller, 93 F.Supp. 146, 148 (1950);
In re Porterfield, 28 Cal. 2d 91, 101, 168 P.2d 706, 713 (1946).

5. California Business and Professions Code Section 6853 Is Neither Ambiguous nor Vague as Applied to Petitioners' Activities.

Floersheim appears to claim that section 6853 requires some type of strained or unreasonable interpretation in order to apply to Floersheim's activities. (Petn., pp. 16-21.) If this be the contention, it is without merit. Neither the trial court nor the Court of Appeal found any ambiguity in the statute. (App. A, p. 11 of Petn.) Nor in any of the proceedings before those courts did Floersheim interpose the defense that the statute is unconstitutionally vague or ambiguous. (Cl. Tr. pp. 54-60, 70-75.)

II.

CALIFORNIA BUSINESS AND PROFESSIONS CODE DOES NOT VIOLATE THE ENTITLING PROVISIONS OF THE CALIFORNIA CONSTITUTION

1. No Federal Question Is Involved in This Issue Since the Constitution of the United States Contains No Provision Regarding Entitling of Statutes and Petitioners Make No Claim That the Alleged Faulty Entitling of the Statute Infringed Upon Any of Petitioners' Rights Accorded Them Under the United States Constitution.

Chase Nat. Bank v. Mobile & O.R. Co., 30 F. Supp. 565-68 (1939);

Sutherland, *Statutory Construction*, 3rd Ed., Vol. 1, Section 1701.

2. Section 6853 Does Not Violate the Entitling Provisions of Article IV, Section 9 of the California Constitution.

The title of the original enactment of the statute into which section 6853 was inserted provided:

> "An *Act to define collection agencies;* to provide for the regulation, bonding, supervision and licensing thereof; to provide for the enforcement of said act and penalties for the violation thereof." (Emphasis added.)

The foregoing title called attention to the fact that the term "collection agency" would be given a new and broad definition in the body of the act. (App. A, p. 10 of Petn.)

See *Metropolitan Water Dist. v. Marquardt*, 59 Cal. 2d 159, 172, 379 P.2d 28, 34 (1963);

State v. Department of Public Service, 1 Wash. 2d 102, 95 P.2d 1007, 1010 (1939).

Moreover, Floersheim has not complained of being misled or prejudiced by the title to the statute. Indeed, Floersheim's claimed conversations with the Director's predecessors since 1953 regarding the forms indicate Floersheim was well aware that the statutory definition of a "collection agency" included the business of selling a "collection system, scheme, or device intended or calculated to be used to collect claims." (Petn. p. 11.)

CONCLUSION

The Director submits that Floersheim has not presented any substantial federal question which would warrant the granting of certiorari. Additionally, the California Court of Appeal correctly decided all constitutional questions raised by Floersheim. For these reasons Director respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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